In The

Supreme Court of the United States

October Term, 1978

NO. 78-161

STATE OF IOWA, STATE CONSERVATION COMMISSION of the STATE OF IOWA,
Petitioners,

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, R. G. P. INCORPORATED, DARREL L., HAROLD, HAROLD M. AND LUEA SORENSON, HAROLD JACKSON, OTIS PETERSON AND TRAVELERS, INSURANCE COMPANY,
Respondents (Petitioners on Separate Petitions),

vs.

OMAHA INDIAN TRIBE AND THE UNITED STATES OF AMERICA,
Respondents.

Brief for Amici Curiae in Support of the State of Iowa's Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

States of Indiana, Alaska, Arkansas, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Utah, Washington, West Virginia, Wisconsin and Wyoming

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AUTHORITY TO FILE AMICI CURIAE BRIEF

The States of Indiana, Alaska, Arkansas, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Nebraska, Nevada, North Carolina, North Dakota,

Ohio, Oregon, South Carolina, South Dakota, Utah, Washington, West Virginia, Wisconsin and Wyoming, through their Attorneys General, respectfully submit this joint brief as amici curiae under the authority of Rule 42 (4), United States Supreme Court Rules. It is in support of the petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit filed by the State of Iowa and the State Conservation Commission of the State of Iowa.

—o—

INTEREST OF AMICI CURIAE

The State of Iowa claims sovereign ownership and jurisdiction over the bed and bank of the Missouri River to the ordinary high water mark on the portion of that river which forms the boundary of Iowa. This Court recently affirmed the principle of such sovereignty in *Oregon v. Corvallis Sand and Gravel Co.*, 429 U. S. 363, 370 (1977) holding,

> . . . Although Federal law may fix the initial boundary line between fast lands and the riverbeds at the time of a State's admission to the Union, the State's title to the riverbed vests absolutely as of the time of its admission and is not subject to later defeasance by operation of any doctrine of federal common law.

In the present case, the Eighth Circuit has divested a state of sovereign title to riparian land by operation of what is stated to be the federal common law of accretion and avulsion.

Moreover, the Eighth Circuit utilized a facially discriminatory statute, 25 U. S. C. § 194, to cast the burden of proof upon a "white person" which included the State

of Iowa. This application of law threatens all states subject to Indian land claims which, due to the Eighth Circuit's interpretation of Indian rights, includes every state in the union.

—o—

BRIEF OF THE AMICI CURIAE

QUESTIONS PRESENTED

1. Whether a state may be classified as a "white person" and the United States and an Indian tribe as "an Indian" within the purview of 25 U. S. C. § 194.

2. Whether 25 U. S. C. § 194 is facially unconstitutional under the due process clause of the Fifth Amendment to the Constitution of the United States.

3. Whether a state may be divested of land title by operation of federal common law.

4. If federal law is applicable to this land, did the Eighth Circuit correctly interpret and apply the federal common law of accretion and avulsion.

—o—

SUPPLEMENTARY STATEMENT OF THE CASE

That *amici* adopt the statement as set forth in the State of Iowa's petition.

REASONS FOR GRANTING THE WRIT

I.

The writ should be granted to allow the Court to correct the erroneous holding that a state is a "White Person" and that the United States and the Omaha Indian Tribe are "An Indian" in applying 25 U. S. C. § 194.

25 U. S. C. § 194 states:

> In all trials about the right of property in which *an Indian* may be a party on one side, and *a white person* on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership. (Emphasis supplied.)

In applying this statute to the facts of this case, the Eighth Circuit has cast the burden of proof upon a state and one of its agencies by designating them as a "white person" within the meaning of § 194. The Petitioner State of Iowa and its agency should not be so classified.

In labeling a state as a "white person", the Eighth Circuit erred in several respects. First, a reading of "person" to include states violates the plain meaning of the word. See *South Carolina v. Katzenbach,* 383 U. S. 301, 323 (1966), which held that a state is not a "person" under the Due Process clause of the Fifth Amendment. In addition, states have never been held to be "persons" under the Civil Rights Act of 1871, 42 U. S. C. § 1983. *Fitzpatrick v. Bitzer,* 427 U. S. 445, 452 (1976). Second, in *United States v. Perryman,* 100 U. S. 235, 237 (1880), this Court held, in the face of an argument that the words

"white person", as used in the 1834 Indian Non-Intercourse Act, Act of June 30, 1834, 4 Stat. 733 meant "non-Indian", that that term means only the white race and does not mean any race other than Indian. Thus, the mixture of races in the state's citizenry precludes the Eighth Circuit's application of this statute. Section 22 of that 1834 Act contains the language that is now 25 U. S. C. § 194.

Third, prior statutes, which date back to 1796, show that the section was not intended to apply to the present facts. As indicated above, the language of § 194 comes from Section 22 of the 1834 Indian Non-Intercourse Act, which was a modification and extension of the 1822 Indian Non-Intercourse Act, Act of May 6, 1822, 3 Stat. 682. The § 194 language in the 1822 Act used "Indians" in plural form. The 1834 Act changed "Indians" to "an Indian", which is the present form of § 194.

Fourth, the language of other sections of the 1834 Act demonstrates a deliberate effort of Congress to apply § 194 only in cases involving land problems of *individual* Indians. Thus, Section 11 of that Act states in relevant part:

> That if any person shall make a settlement on the lands belonging, secured or granted by treaty with the United States to any Indian *tribe,* or shall survey or shall attempt to survey such lands, or designate any of the boundaries by marking trees or otherwise, such offender shall forfeit and pay the sum of one thousand dollars. (Emphasis supplied.)

Section 12 of the 1834 Act provides, in part:

> That no purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any

> Indian *nation* or *tribe of Indians*, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution. (Emphasis supplied.)

Section 12 in the 1834 Act also amended the 1802 language of the Indian Non-Intercourse Act, Act of March 30, 1802, 2 Stat. 141, which made any conveyance of land "from *any Indian or nation or tribe of Indians* invalid, unless conveyed by treaty or convention". The 1834 Act dropped the word "Indian" from that sentence to read "any nation or tribe of Indians," thus carefully clarifying the distinction between land owned by a tribe and land owned by an individual Indian.

Fifth, Sections 4, 7 and 8 of the 1834 Act show additional Congressional intent as to the meaning of the terms "an Indian" and "a white person" in Section 22 of that Act. All contain penalties against "any person other than an Indian", showing that Congress knew how to make such a general classification if it chose to do so and thus that "white person" is a specific racial classification referring to a white individual. It further shows that the words "an Indian" in Section 22 of the 1834 Act refer to an individual person.

The *amici* states support the State of Iowa in its Petition to correct the Eighth Circuit's use of 25 U. S. C. § 194 which threatens any state subject to Indian tribal claims. Footnote 1 of the *amicus curiae* brief filed in this case by the American Land Title Association cites a representative, but not all-inclusive list of the pending litigation involving Indian land claims. That list will grow rapidly with great hardship to the states and individuals involved if this decision is allowed to stand.

II.

The writ should be granted to review 25 U. S. C. § 194 which is facially unconstitutional under the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

It is obvious from the plain wording of § 194 and our arguments above that the statute discriminates in favor of the Indian race by casting the burden of proof upon the white race in all litigation involving right to property, contrary to the practice in virtually all cases and jurisdiction. Except under this statute, the burden is always upon the *plaintiff*. But here the burden is determined only by the color of one's skin. In reviewing such a racial distinction, this Court stated in *Loving v. Virginia*, 388 U. S. 1, 11 (1967):

> "Over the years, this Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.' *Hirabayashi v. United States*, 320 U. S. 81, 100 (1943). At the very least, the Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny,' *Korematsu v. United States*, 323 U. S. 214, 216 (1944), and, *if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.*" *Loving v. Virginia*, 388 U. S. 1, 11, 87 S. Ct. 1817, 1823, 18 L. Ed. 2d 1010, 1017 (1967). (Emphasis supplied.)

The Eighth Circuit has failed to demonstrate that the discrimination of § 194 is "necessary" to the accomplishment of a permissible legislative objective. Its reliance

upon *Morton v. Mancari,* 417 U. S. 535, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974) is misplaced. In *Regents of the University of California v. Bakke,* — U. S. —, 98 S. Ct. 2773 (1978) this Court discussed *Morton v. Mancari* as follows:

> "Petitioner also cites our decision in *Morton v. Mancari,* 417 U. S. 535 (1974), for the proposition that the State may prefer members of traditionally disadvantaged groups. In *Mancari,* we approved a hiring preference for qualified Indians in the Bureau of Indian Affairs of the Department of the Interior (BIA). We observed in that case, however, that the legal status of BIA is *sui generis. Id.,* at 554. Indeed, we found that the preference was not racial at all, but 'an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to groups [,] . . . whose lives are governed by the BIA in a unique fashion.'"

In *Mancari,* this Court said at page 554:

> Here the preference is reasonably and directly related to a legitimate, non-racially based goal. This is the principal characteristic that generally is absent from proscribed forms of racial discrimination.

Section 194 has no "non-racially based goal". The Eighth Circuit acknowledged that the statute was premised on a policy of preferential, protectionist treatment of Indians. 575 F. 2d 632. In footnote 20 on page 632 a citation is made to a 1924 U. S. Attorney General's Opinion, 34 Op. Attorney General 439 (1925), which discusses this policy. The first sentence states that "from the beginning of *its* negotiations with the Indians, *the Government* has adopted a policy of giving them the benefit of the doubt . . .", and the last sentence concludes "Treaties

have been considered, not according to their technical meaning, but in the sense in which they would be naturally understood by the Indians."

Iowa's situation is quite unlike that described. It involves the United States and the Omaha Tribe, capably represented by their lawyers, asserting a claim to property also claimed by individuals, a corporation and the State of Iowa, also capably represented. The basis for the preferential treatment of Indians is lacking. This is not a case involving interpretation of a vague treaty which could have been worded to take property from the Indian. Title to this land will be determined (and was) by the application of legal principles of accretion and avulsion, not by interpreting the terms of the 1854 Treaty, 40 Stat. 1043. The historic basis for preferential treatment is no longer present and any "necessity" so critical to the validity of this facially discriminatory state has disappeared.

The concern of the *amici* should be apparent. If allowed to stand, the Eighth Circuit's decision designates the state "a white person" and then casts the burden of proof upon that state to prove good title to land. A state is not a "person" for purposes of direct application of Fifth Amendment protection of property rights but as held in *South Carolina v. Katzenbach,* 383 U. S. 301, 323-24 (1966):

> The word "person" in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union. . . . [However] objections to the Act which are raised under these provisions may be considered . . . as additional aspects

> of the basic question presented by the case: Has Congress exercised its powers . . . in an appropriate manner with relation to the States?

Often a state may have no *record* title to its land, and never to its sovereign land. Now, in the Eighth Circuit, all statutory presumptions of record title are lost and race determines who has the burden when an Indian claims the land. No land in the United States is immune from such a challenge since it was all "possessed", or is now claimed to have been possessed, by an Indian tribe or tribes at one time or another. Indian Land Cessions in the United States, 18th Annual Report, Bureau of American Ethnology, Part 2 (1899). Indeed, as this court has held, *United States v. Santa Fe Railroad,* 314 U. S. 345 (1941); *Johnson v. McIntosh,* 21 U. S. 543 (1823); *Cherokee Nation v. Georgia,* 30 U. S. 1 (1831); *The Oneida Indian Nation v. County of Oneida,* 414 U. S. 661 (1974), aboriginal title is a possessory right and if the Eighth Circuit's decision herein is allowed to stand, any Indian tribe held to have aboriginal title under the Indian Claims Commission Act, Act of August 12, 1946, 60 Stat. 1049 (1946) would have possession under § 194. The results can be unimaginably far reaching.

III.

The writ should be granted to correct the erroneous holding of the Eighth Circuit that federal, not state, law of accretion and avulsion is applicable to this case.

In its decision, the Eighth Circuit recognized the basic rule that the laws of the states determine the ownership of riparian land, citing to *Oregon v. Corvallis Sand and*

Gravel Co., supra. But the court found an exception, or what it characterized as a "caveat", 575 F. 2d 620, 628, citing to *Corvallis,* at 375:

> If a navigable stream is an interstate boundary, this Court, in the exercise of its original jurisdiction over suits between states, has necessarily developed a body of federal common law to determine the effect of a change in the bed of the stream on the boundary.

Thus, to support its determination that federal, rather than state, law was applicable, the Eighth Circuit concluded that this case involved a claimed change in the interstate boundary between Iowa and Nebraska as a necessary consequence of a claimed change in the boundary of the reservation. That conclusion was erroneous. In 1943, Nebraska and Iowa entered into a boundary compact which was ratified by Congress in Act of July 12, 1943, 57 Stat. 494 (1943). That compact set the boundary line between the states at the line in "the middle of the main channel of the Missouri River," defined as the "center line of the proposed stabilized channel of the Missouri River as established by the United States engineer's office . . ." *Nebraska v. Iowa,* 406 U. S. 117, 118 (1972).

By this compact, the boundary between the states was set upon the metes and bounds description of that center line and recognized by Congress. The determination and resolution of the issues of this case will determine title to land, but it will not alter the boundary between the two states. The Eighth Circuit quoted from *Arkansas v. Tennessee,* 246 U. S. 158 (1918), but not as fully as this Court did in *Nebraska v. Iowa, supra* at page 176:

> How the land that emerges on either side of an interstate boundary stream shall be disposed of as between

> public and private ownership is a matter to be determined according to the law of each State, under the familiar doctrine that it is for the States to establish for themselves such rule of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them . . . But *these dispositions are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary from where otherwise it should be located.*" 575 F. 2d 620 at 628. (Eighth Circuit's cite italicized.)

The State of Iowa does not seek to "press back" the interstate boundary. It is her objective, and in the interest of all states appearing as *amicus,* that Iowa be allowed to apply state law to determine title to land that exists within the borders of Iowa. It is crucial that this Court examine the Eighth Circuit's radical departure from general principles of river law and prevent undue confusion which would result from the application of federal law by the federal courts and state law by the state courts in the same geographical area.

The Eighth Circuit's reasoning that federal common law applies because Indian trust land is involved requires consideration also.

In *Oregon v. Corvallis Sand and Gravel Co., supra,* at 370, this court held:

> . . . Although Federal law may fix the initial boundary line between fast lands and the riverbeds at the time of a State's admission to the Union, the State's title to the riverbed vests absolutely as of the time of its admission and is not subject to later defeasement by operation of any federal common law.

The Eighth Circuit distinguished this case from that authority by finding that the defendants (petitioners here)

have attempted to extinguish the aboriginal title, which at one time may have been in the Omaha Tribe. 575 F. 2d 620 at 629. It cited to *Oneida Indian Nation v. County of Oneida,* 414 U. S. 661, 677 (1974), and *Confederated Salish & Kootenai Tribes v. Namen,* 380 F. Supp. 452 (D. Mont. 1974), *aff'd,* 534 F. 2d 1376 (9th Cir.), *cert. denied,* 429 U. S. 929 (1976), for support that federal common law applies. In the *Oneida* case, *supra,* land that was once possessed by the Oneida Tribe in the state of New York was ceded to the state without the approval of Congress. This Court held that a federal controversy existed within the requirements of 28 U. S. C. § 1331 and § 1362, and that federal law protects the possessory rights to tribal land. In *Namen, supra,* the defendant built a pier and wharf over a lake which was wholly within an Indian reservation. Again, this Court agreed with the Ninth Circuit that the United States held, as trustee, title to the lake bed and federal common law would determine riparian rights.

This present case is distinguishable from that authority. Here, no claim of adverse possession or illegal transfer of Indian land is involved. The question here is whether the geographic change was a result of accretion or avulsion. The trial court's determination of this fact question was improperly overturned by the Eighth Circuit. The land in question is now situated within the boundaries of the State of Iowa by Act of Congress and Iowa was vested with title to the beds of rivers and streams when admitted to the Union of the United States. Act of December 28, 1846, 9 St. L. 117. In Iowa's case, that was eight years prior to the 1854 Treaty with the Omaha Tribe, 40 Stat. 1043, and 21 years before the Bar-

rett Survey established the eastern boundary of the Omaha Reservation. In the *Oneida* and *Namen* cases mentioned above, there was no question but that Indian land was involved. The courts found that the federal trusteeship of Indian lands required federal law to be applied. The critical difference here is that *this land may not be Indian land* (indeed the trial court found it was not). To apply federal common law on the premise that Indian land is involved is a mistake analogous to the finding of previous Indian possession under 25 U. S. C. § 194. It begs the question by assuming the answer to the issue: Is the land, that now exists within Iowa's boundary, land in place after an avulsion and therefore Indian land or is it land resulting from accretion? The amici states request this Court to determine the applicability of state and federal law under these circumstances.

IV.

The writ should be granted to correct the Eighth Circuit's erroneous interpretation and application of the law of accretion and avulsion, even if the federal common law is applicable.

93 C. J. S. 750, 751, *Waters*, § 76 states:

> In determining whether an addition to land constitutes accretion, the length of time during which it is in the course of formation is not of importance. If it is formed by a gradual, imperceptible deposit of alluvium, it is accretion, but, if the stream changes its course suddenly and in such manner as not to destroy the integrity of the land in controversy and so that the land can be identified, it is not accretion.

The Eighth Circuit's decision rejects this principle of law and the authority of *Nebraska v. Iowa*, 143 U. S. 359 (1892). That case held that the identity of fast land in place is the essential factor in designating a channel change as avulsive rather than accretive and not the speed of the erosion and deposition of the land. The rejection of this reasoning creates a conflict with a long line of cases in this Court, other federal courts and state courts which have followed the holding of *Nebraska v. Iowa*, supra. See *Oklahoma v. Texas*, 260 U. S. 606, 637 (1922); *Louisiana v. Mississippi*, 384 U. S. 24; *Special Masters Report*, pp. 14, 15, 16; *Nebraska v. Iowa*, 406 U. S. 117 (1972); *Bonelli Cattle Co. v. Arizona*, 414 U. S. 313, 326 (1973), (overruled on other grounds, *Oregon v. Corvallis, infra*); *Mississippi v. Arkansas*, 415 U. S. 289, 291 (1974); *Oregon v. Corvallis Sand & Gravel Co.*, 429 U. S. 363 (1977).

See also, *Conkey v. Knudsen*, 143 Neb. 5, 8 N. W. 2d 538 (1943), vacating 141 Neb. 517, 4 N. W. 2d 290 (1942); *Independent Stock Farm v. Stevens*, 128 Neb. 619, 259 N. W. 647 (1935); *Iowa R. R. Land Co. v. Coulthard*, 96 Neb. 607, 148 N. W. 328 (1914). These and several other state cases—*Yutterman v. Grier*, 112 Ark. 366, 166 S. W. 749, 751 (1914); *Longabaugh v. Johnson*, 321 N. E. 2d 865, 867 (Ind. App. 1975); *Coulthard v. Stevens*, 84 Iowa 241, 50 N. W. 983, 984 (1892); *McCormick v. Miller*, 239 Mo. 463, 144 S. W. 101, 103 (1912); *Attorney General ex rel. Becker v. Bay Boom Wild Rice & Fur Farm*, 172 Wis. 363, 178 N. W. 569, 573 (1920)—which discuss identifiable land in place as one of the key factors in a finding of avulsion, all ultimately rely on either *Nebraska v. Iowa, supra*, or *Benson v. Morrow*, 61

Mo. 345 (1875). The Eighth Circuit reads the *Nebraska v. Iowa* case as an expansion rather than a limitation of the scope of avulsion, 575 F. 2d at 636. Such reasoning, nevertheless, does not allow two totally different concepts to govern in the same situation. Avulsion must be determined either by identifiable land in place or by the speed of the channel change.

The clearest example of the conflict of this decision with prior case law appears in the Special Masters report in *Louisiana v. Mississippi,* 384 U. S. 24 (1966), which asked the question:

> "Can there be an avulsion where the entire change in the channel takes place in the same riverbed, leaving no surface land between the two channels?"

The Master then answered the question in the negative, stating:

> "The Special Master's study of the applicable case law leads to the conclusion that there are but two rules—or rather one long-standing general rule and its exception—which can be applied to river boundary changes. The general rule is that the boundary follows the changes in the main navigable channel. The exception is that when there is a cutoff, natural or artificial, the old bend that has been cut off remains the boundary in that particular area. Louisiana contends that since the cutting of the new deep-water channel was not altogether a gradual process of erosion and accretion, it must be an avulsion.
>
> "This contention is untenable. All case law and all reasoning behind these rules point to the opposite conclusion—that the general rule of the 'live thalweg' is preferable and will be applied in all cases, unless there has been a clear and convincing avulsion. This avulsion must be sudden and perceptible . . . we

> have been unable to find any case, with facts similar to the instant case, in which an avulsion has been found by the Court where the river remains in the same bed of the stream. In all such cases the new channel was formed when the river 'suddenly leaves its old bed and forms a new one. . . .' *Arkansas v. Tennessee,* 246 U. S. 158, 173."

Special Master's Report, p. 17, confirmed, *Louisiana v. Mississippi,* supra (19-6).

The *amici* states ask this Court to correct or reconcile the Eighth Circuit's interpretation of federal law with the prior case law on this issue. If allowed to stand as is, this decision sets legally untenable precedent in cases involving accretive and avulsive changes in navigable streams and rivers, especially when two states are affected.

—o—

CONCLUSION

This is a case of major national significance. This brief is joined by states representing virtually every circuit. The radical departures from traditional concepts governing title to riparian lands, as espoused by the Eighth Circuit, should be reviewed by our highest Court. If these departures prevail, they will have a revolutionary effect on ownership of land throughout the nation.

Respectfully submitted,

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